

# United States Senate

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

June 8, 2017

The Honorable Phyllis K. Fong  
Inspector General  
U.S. Department of Agriculture  
Room 117-W Jamie Whitten Bldg  
1400 Independence Avenue SW  
Washington, DC 20250

Dear Inspector General Fong:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Agriculture's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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<sup>1</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

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Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

Following the transmittal of our letter to Archivist Ferriero, NARA issued a memo on March 15, 2017, “to all Senior Agency Officials for Records Management that addresses, among other things, ‘Electronic Messaging and Encrypted Messages.’”<sup>9</sup> Archivist Ferriero’s memo reiterates that “agencies are responsible for properly managing electronic messages that are Federal records whether they are SMS texts, encrypted communications, direct messages on social media platforms, email or created on any other type of electronic messaging system or

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account.”<sup>10</sup> The Archivist’s memo also addressed the recent “news stories referring to the possible use by government employees of non-official, commercial communication applications such as WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent.”<sup>11</sup> Archivist Ferriero advised federal agencies that:

Any use of such communication applications requires coordination with your legal counsel and records management officials to ensure compliance with the Federal Records Act and related regulations. Agencies are responsible for setting policies that govern the use of these applications prior to their deployment and must take steps to manage and preserve records created through their use for as long as required.<sup>12</sup>

### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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policy, unless specifically authorized by me [the Acting Secretary]" or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA's lack of responsiveness to congressional requests for information on the Trump Organization's lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA's "long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight."<sup>16</sup> During a recent bipartisan briefing with GSA, "agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee's chairman."<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, "told agencies not to cooperate" with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees' ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

In order to better understand the Department's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Department official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
2. Since January 20, 2017, has any Department official directed or advised any agency employee or Congressional staff member that the agency will only provide requested documents or information to a Committee chair? If any such directive is in writing, please provide a copy.
3. Since January 20, 2017, has the Department issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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4. Since January 20, 2017, has any Department official used, for work-related communications, a smartphone app, including, but not limited to, WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent?
5. Since January 20, 2017, has any Department official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]  
[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN MCCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
JOHN HOEVEN, NORTH DAKOTA  
STEVE DAINES, MONTANA

CLAIRE McCASKILL, MISSOURI  
THOMAS R. CARPER, DELAWARE  
JON TESTER, MONTANA  
HEIDI HEITKAMP, NORTH DAKOTA  
GARY C. PETERS, MICHIGAN  
MARGARET WOOD HASSAN, NEW HAMPSHIRE  
KAMALA D. HARRIS, CALIFORNIA

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Ann Calvaresi Barr  
Inspector General  
U.S. Agency for International Development  
1300 Pennsylvania Avenue, NW  
Washington, DC 20523

Dear Inspector General Calvaresi Barr:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Agency for International Development's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

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### **Cooperation with Congressional Requests**

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While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Peggy E. Gustafson  
Inspector General  
U.S. Department of Commerce  
1401 Constitution Avenue N.W.  
Washington, DC 20250

Dear Inspector General Gustafson:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Commerce's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

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6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable John Roth  
Inspector General  
U.S. Department of Homeland Security  
245 Murray Lane SW  
Washington, DC 20528-0305

Dear Inspector General Roth:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Homeland Security's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

Following the transmittal of our letter to Archivist Ferriero, NARA issued a memo on March 15, 2017, “to all Senior Agency Officials for Records Management that addresses, among other things, ‘Electronic Messaging and Encrypted Messages.’”<sup>9</sup> Archivist Ferriero’s memo reiterates that “agencies are responsible for properly managing electronic messages that are Federal records whether they are SMS texts, encrypted communications, direct messages on social media platforms, email or created on any other type of electronic messaging system or

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Any use of such communication applications requires coordination with your legal counsel and records management officials to ensure compliance with the Federal Records Act and related regulations. Agencies are responsible for setting policies that govern the use of these applications prior to their deployment and must take steps to manage and preserve records created through their use for as long as required.<sup>12</sup>

### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

Mr. Glenn A. Fine  
Acting Inspector General  
U.S. Department of Defense  
4800 Mark Center Drive,  
Alexandria, VA 22350-1500

Dear Acting Inspector General Fine:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Defense's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

Ms. April Stephenson  
Acting Inspector General  
U.S. Department of Energy  
1000 Independence Avenue, SW  
Washington, DC 20585

Dear Acting Inspector General Stephenson:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Energy's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

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6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

Ms. Mary L. Kendall  
Acting Inspector General  
U.S. Department of the Interior  
1849 C Street NW - Mail Stop 4428  
Washington, D.C. 20240

Dear Acting Inspector General Kendall:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of the Interior's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

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[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Michael E. Horowitz  
Inspector General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Suite 4706  
Washington, D.C. 20530-0001

Dear Inspector General Horowitz:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Justice's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

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[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Scott S. Dahl  
Inspector General  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Room S-5502  
Washington, DC 20210

Dear Inspector General Dahl:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Labor's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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<sup>1</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

<sup>2</sup> 44 U.S.C. § 2911.

<sup>3</sup> Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2203.

<sup>4</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

Following the transmittal of our letter to Archivist Ferriero, NARA issued a memo on March 15, 2017, “to all Senior Agency Officials for Records Management that addresses, among other things, ‘Electronic Messaging and Encrypted Messages.’”<sup>9</sup> Archivist Ferriero’s memo reiterates that “agencies are responsible for properly managing electronic messages that are Federal records whether they are SMS texts, encrypted communications, direct messages on social media platforms, email or created on any other type of electronic messaging system or

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<sup>7</sup> Letter from Sen. Claire McCaskill, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs and Sen. Tom Carper to David Ferriero, Archivist of the United States (Mar. 7, 2017).

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Any use of such communication applications requires coordination with your legal counsel and records management officials to ensure compliance with the Federal Records Act and related regulations. Agencies are responsible for setting policies that govern the use of these applications prior to their deployment and must take steps to manage and preserve records created through their use for as long as required.<sup>12</sup>

### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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policy, unless specifically authorized by me [the Acting Secretary]" or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA's lack of responsiveness to congressional requests for information on the Trump Organization's lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA's "long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight."<sup>16</sup> During a recent bipartisan briefing with GSA, "agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee's chairman."<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, "told agencies not to cooperate" with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees' ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

In order to better understand the Department's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Department official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
2. Since January 20, 2017, has any Department official directed or advised any agency employee or Congressional staff member that the agency will only provide requested documents or information to a Committee chair? If any such directive is in writing, please provide a copy.
3. Since January 20, 2017, has the Department issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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4. Since January 20, 2017, has any Department official used, for work-related communications, a smartphone app, including, but not limited to, WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent?
5. Since January 20, 2017, has any Department official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Calvin L. Scovel III  
Inspector General  
U.S. Department of Transportation  
1200 New Jersey Ave. S.E. - 7th Floor  
Washington, DC 20590

Dear Inspector General Scovel:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Transportation's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

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of Congress, Governors) or containing interpretation or statements of Department regulations or policy, unless specifically authorized by me [the Acting Secretary]" or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA's lack of responsiveness to congressional requests for information on the Trump Organization's lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA's "long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight."<sup>16</sup> During a recent bipartisan briefing with GSA, "agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee's chairman."<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, "told agencies not to cooperate" with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees' ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

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Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Kathleen Tighe  
Inspector General  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202-1500

Dear Inspector General Tighe:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Education's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

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1. Since January 20, 2017, has any Department official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
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5. Since January 20, 2017, has any Department official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]  
[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN MCCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
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KAMALA D. HARRIS, CALIFORNIA

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Arthur A. Elkins Jr.  
Inspector General  
U.S. Environmental Protection Agency  
200 Pennsylvania Avenue, N.W. (2410T)  
Washington, DC 20460

Dear Inspector General Elkins:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Environmental Protection Agency's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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<sup>1</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

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<sup>4</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

Following the transmittal of our letter to Archivist Ferriero, NARA issued a memo on March 15, 2017, “to all Senior Agency Officials for Records Management that addresses, among other things, ‘Electronic Messaging and Encrypted Messages.’”<sup>9</sup> Archivist Ferriero’s memo reiterates that “agencies are responsible for properly managing electronic messages that are Federal records whether they are SMS texts, encrypted communications, direct messages on social media platforms, email or created on any other type of electronic messaging system or

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<sup>6</sup> Frequently Asked Questions, Confide (online <https://getconfide.com/faq>) (accessed on Feb. 17, 2017).

<sup>7</sup> Letter from Sen. Claire McCaskill, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs and Sen. Tom Carper to David Ferriero, Archivist of the United States (Mar. 7, 2017).

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account.”<sup>10</sup> The Archivist’s memo also addressed the recent “news stories referring to the possible use by government employees of non-official, commercial communication applications such as WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent.”<sup>11</sup> Archivist Ferriero advised federal agencies that:

Any use of such communication applications requires coordination with your legal counsel and records management officials to ensure compliance with the Federal Records Act and related regulations. Agencies are responsible for setting policies that govern the use of these applications prior to their deployment and must take steps to manage and preserve records created through their use for as long as required.<sup>12</sup>

### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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policy, unless specifically authorized by me [the Acting Secretary]" or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA's lack of responsiveness to congressional requests for information on the Trump Organization's lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA's "long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight."<sup>16</sup> During a recent bipartisan briefing with GSA, "agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee's chairman."<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, "told agencies not to cooperate" with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees' ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

In order to better understand the Agency's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Agency official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
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3. Since January 20, 2017, has the Agency issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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6. Has the OIG previously provided recommendations to the Agency regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]  
[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Carol Fortine Ochoa  
Inspector General  
U.S. General Services Administration  
1800 F St NW  
Washington, D.C. 20405

Dear Inspector General Ochoa:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the U.S. General Services Administration's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

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policy, unless specifically authorized by me [the Acting Secretary]" or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA's lack of responsiveness to congressional requests for information on the Trump Organization's lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA's "long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight."<sup>16</sup> During a recent bipartisan briefing with GSA, "agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee's chairman."<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, "told agencies not to cooperate" with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees' ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

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If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN MCCAIN, ARIZONA  
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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Daniel R. Levinson  
Inspector General  
U.S. Department of Health and Human Services  
330 Independence Avenue, SW  
Washington, DC 20201

Dear Inspector General Levinson:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Health and Human Services processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

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In order to better understand the Department's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Department official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
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5. Since January 20, 2017, has any Department official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]  
[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable David A. Montoya  
Inspector General  
U.S. Department of Housing and Urban Development  
Office of Inspector General  
451 7th Street, SW  
Washington, DC 20410

Dear Inspector General Montoya:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Housing and Urban Development's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

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ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
JOHN HOEVEN, NORTH DAKOTA  
STEVE DAINES, MONTANA

CLAIRE McCASKILL, MISSOURI  
THOMAS R. CARPER, DELAWARE  
JON TESTER, MONTANA  
HEIDI HEITKAMP, NORTH DAKOTA  
GARY C. PETERS, MICHIGAN  
MARGARET WOOD HASSAN, NEW HAMPSHIRE  
KAMALA D. HARRIS, CALIFORNIA

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Paul K. Martin  
Inspector General  
National Aeronautics and Space Administration  
Two Independence Square  
300 E Street, SW, Suite 8V39  
Washington, DC 20546

Dear Inspector General Martin:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the National Aeronautics and Space Administration's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

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<sup>15</sup> Memorandum from Acting Secretary, U.S. Department of Health and Human Services to HHS OPDIVHeads and StaffDiv Heads (Jan. 20, 2017).

<sup>16</sup> Senator Tom Carper, *Carper Statement on Trump Hotel Lease* (Mar. 31, 2017) (online at <https://www.carper.senate.gov/public/index.cfm/pressreleases?ID=77B68657-FD23-4902-9A64-AE1314F64EAF>).

<sup>17</sup> *Id.*

<sup>18</sup> *White House Orders Agencies to Ignore Democrats' Oversight Requests*, *Politico* (June 2, 2017) (online <http://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034>).



4. Since January 20, 2017, has any Administration official used, for work-related communications, a smartphone app, including, but not limited to, WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent?
5. Since January 20, 2017, has any Administration official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Administration regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN McCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
JOHN HOEVEN, NORTH DAKOTA  
STEVE DAINES, MONTANA

CLAIRE McCASKILL, MISSOURI  
THOMAS R. CARPER, DELAWARE  
JON TESTER, MONTANA  
HEIDI HEITKAMP, NORTH DAKOTA  
GARY C. PETERS, MICHIGAN  
MARGARET WOOD HASSAN, NEW HAMPSHIRE  
KAMALA D. HARRIS, CALIFORNIA

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Hubert Bell  
Inspector General  
U.S. Nuclear Regulatory Commission  
Mail Stop O5-E13  
11555 Rockville Pike  
Rockville, MD 20852

Dear Inspector General Bell:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Nuclear Regulatory Commission's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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<sup>1</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

<sup>2</sup> 44 U.S.C. § 2911.

<sup>3</sup> Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2203.

<sup>4</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

Following the transmittal of our letter to Archivist Ferriero, NARA issued a memo on March 15, 2017, “to all Senior Agency Officials for Records Management that addresses, among other things, ‘Electronic Messaging and Encrypted Messages.’”<sup>9</sup> Archivist Ferriero’s memo reiterates that “agencies are responsible for properly managing electronic messages that are Federal records whether they are SMS texts, encrypted communications, direct messages on social media platforms, email or created on any other type of electronic messaging system or

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<sup>5</sup> *Donald Trump’s White House Staff ‘Communicate Through App Which Automatically Deletes Messages’*, *The Independent* (Feb. 15, 2017) (online at <http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-white-house-staff-confide-communicate-app-auto-delete-messages-leaks-russia-us-a7581046.html>).

<sup>6</sup> Frequently Asked Questions, Confide (online <https://getconfide.com/faq>) (accessed on Feb. 17, 2017).

<sup>7</sup> Letter from Sen. Claire McCaskill, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs and Sen. Tom Carper to David Ferriero, Archivist of the United States (Mar. 7, 2017).

<sup>8</sup> Letter from David Ferriero, Archivist of the United States to Sen. Claire McCaskill, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs and Sen. Tom Carper (Mar. 30, 2017).

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account.”<sup>10</sup> The Archivist’s memo also addressed the recent “news stories referring to the possible use by government employees of non-official, commercial communication applications such as WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent.”<sup>11</sup> Archivist Ferriero advised federal agencies that:

Any use of such communication applications requires coordination with your legal counsel and records management officials to ensure compliance with the Federal Records Act and related regulations. Agencies are responsible for setting policies that govern the use of these applications prior to their deployment and must take steps to manage and preserve records created through their use for as long as required.<sup>12</sup>

### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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<sup>10</sup> Memorandum from David Ferriero, Archivist of the United States to Senior Agency Officials for Records Management re: Records Management Priorities for 2017 (March 15, 2017).

<sup>11</sup> *Id.*

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<sup>13</sup> Sen. Sheldon Whitehouse, *Senate Democrats Release List of Over 100 Oversight Letters President Trump Refuses to Answer* (Mar. 15, 2017) (online at <https://www.whitehouse.senate.gov/news/release/senate-democrats-release-list-of-over-100-oversight-letters-president-trump-refuses-to-answer>).

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policy, unless specifically authorized by me [the Acting Secretary]" or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA's lack of responsiveness to congressional requests for information on the Trump Organization's lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA's "long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight."<sup>16</sup> During a recent bipartisan briefing with GSA, "agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee's chairman."<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, "told agencies not to cooperate" with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees' ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

In order to better understand the Commission's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Commission official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
2. Since January 20, 2017, has any Commission official directed or advised any agency employee or Congressional staff member that the agency will only provide requested documents or information to a Committee chair? If any such directive is in writing, please provide a copy.
3. Since January 20, 2017, has the Commission issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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6. Has the OIG previously provided recommendations to the Commission regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] Senator Carper's office at 202-224-2441. [REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Allison C. Lerner  
Inspector General  
National Science Foundation  
4201 Wilson Boulevard,  
Arlington, Virginia 22230

Dear Inspector General Lerner:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the National Science Foundation's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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policy, unless specifically authorized by me [the Acting Secretary]” or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA’s lack of responsiveness to congressional requests for information on the Trump Organization’s lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA’s “long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight.”<sup>16</sup> During a recent bipartisan briefing with GSA, “agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee’s chairman.”<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, “told agencies not to cooperate” with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees’ ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

In order to better understand the Foundation’s compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Foundation official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
2. Since January 20, 2017, has any Foundation official directed or advised any agency employee or Congressional staff member that the agency will only provide requested documents or information to a Committee chair? If any such directive is in writing, please provide a copy.
3. Since January 20, 2017, has the Foundation issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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4. Since January 20, 2017, has any Foundation official used, for work-related communications, a smartphone app, including, but not limited to, WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent?
5. Since January 20, 2017, has any Foundation official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Foundation regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Norbert Vint  
Acting Inspector General  
U.S. Office of Personnel Management  
1900 E Street, NW  
Washington, DC 20415-100

Dear Acting Inspector General Vint:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Office of Personnel Management's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

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<sup>11</sup> *Id.*

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In order to better understand the Agency's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Agency official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
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3. Since January 20, 2017, has the Agency issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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<sup>16</sup> Senator Tom Carper, *Carper Statement on Trump Hotel Lease* (Mar. 31, 2017) (online at <https://www.carper.senate.gov/public/index.cfm/pressreleases?ID=77B68657-FD23-4902-9A64-AE1314F64EAF>).

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4. Since January 20, 2017, has any Agency official used, for work-related communications, a smartphone app, including, but not limited to, WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent?
5. Since January 20, 2017, has any Agency official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Agency regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

Mr. Hannibal M. Ware  
Acting Inspector General  
U.S. Small Business Administration  
409 3rd St, SW  
Washington, DC 20416

Dear Acting Inspector General Ware:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Small Business Administration's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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<sup>1</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

<sup>2</sup> 44 U.S.C. § 2911.

<sup>3</sup> Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2203.

<sup>4</sup> U.S. National Archives and Records Administration, Electronic Messages White Paper (Aug. 2016) (online at <https://www.archives.gov/files/records-mgmt/resources/emessageswp.pdf>).

Although NARA has confirmed that the capture of electronic messages creates unique challenges throughout government, various public reports raise questions about whether Trump Administration officials are intentionally skirting compliance with federal record keeping requirements. For example, *The Independent* recently reported that White House staffers are using a “confidential messenger” app called “Confide” that deletes messages once they have been opened, leaving no record of them or their content thereafter.<sup>5</sup> Confide messages cannot be printed or archived and the company indicates that “Even we at Confide cannot decrypt or see any messages.”<sup>6</sup> The app allows users to transmit text messages, photos, documents, and voice messages, and provides two forms of screenshot protection, which prevents recipients of an image from taking a screenshot of it. Use by federal employees of private messenger applications, such as Confide, to conduct official business flies in the face of federal recordkeeping laws and the principles of government transparency.

In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

Following the transmittal of our letter to Archivist Ferriero, NARA issued a memo on March 15, 2017, “to all Senior Agency Officials for Records Management that addresses, among other things, ‘Electronic Messaging and Encrypted Messages.’”<sup>9</sup> Archivist Ferriero’s memo reiterates that “agencies are responsible for properly managing electronic messages that are Federal records whether they are SMS texts, encrypted communications, direct messages on social media platforms, email or created on any other type of electronic messaging system or

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<sup>7</sup> Letter from Sen. Claire McCaskill, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs and Sen. Tom Carper to David Ferriero, Archivist of the United States (Mar. 7, 2017).

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### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

Ms. Gale Stallworth Stone  
Acting Inspector General  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21235

Dear Acting Inspector General Stallworth Stone:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Social Security Administration's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

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If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]

[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

RON JOHNSON, WISCONSIN, CHAIRMAN

JOHN MCCAIN, ARIZONA  
ROB PORTMAN, OHIO  
RAND PAUL, KENTUCKY  
JAMES LANKFORD, OKLAHOMA  
MICHAEL B. ENZI, WYOMING  
JOHN HOEVEN, NORTH DAKOTA  
STEVE DAINES, MONTANA

CLAIRE McCASKILL, MISSOURI  
THOMAS R. CARPER, DELAWARE  
JON TESTER, MONTANA  
HEIDI HEITKAMP, NORTH DAKOTA  
GARY C. PETERS, MICHIGAN  
MARGARET WOOD HASSAN, NEW HAMPSHIRE  
KAMALA D. HARRIS, CALIFORNIA

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Steve A. Linick  
Inspector General  
U.S. Department of State  
Office of Inspector General  
Room 8100, SA-3  
2201 C Street, N.W. Washington, DC 20520-0308

Dear Inspector General Linick:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of State's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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In response to these reports, on March 7, 2017, we wrote to the Archivist of the United States seeking information regarding any guidance NARA has provided to Trump Administration officials, as well as the Trump Administration’s compliance with records preservation laws.<sup>7</sup> Archivist David Ferriero provided a detailed response to our letter and included copies of Presidential Records Act (PRA) guidance provided by NARA to the Office of the White House Counsel in a February 2, 2017 briefing on PRA compliance.<sup>8</sup> According to the Archivist’s response letter, NARA was not in a position to answer our questions regarding whether officials at federal agencies used any smartphone apps, such as Confide, for work-related communications, or whether any government official at federal agencies have been instructed to avoid using email as a method of work-related communication.

Following the transmittal of our letter to Archivist Ferriero, NARA issued a memo on March 15, 2017, “to all Senior Agency Officials for Records Management that addresses, among other things, ‘Electronic Messaging and Encrypted Messages.’”<sup>9</sup> Archivist Ferriero’s memo reiterates that “agencies are responsible for properly managing electronic messages that are Federal records whether they are SMS texts, encrypted communications, direct messages on social media platforms, email or created on any other type of electronic messaging system or

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Any use of such communication applications requires coordination with your legal counsel and records management officials to ensure compliance with the Federal Records Act and related regulations. Agencies are responsible for setting policies that govern the use of these applications prior to their deployment and must take steps to manage and preserve records created through their use for as long as required.<sup>12</sup>

### **Cooperation with Congressional Requests**

Reports that Trump Administration officials have used practices that undermine transparency of public records are also unfortunately consistent with this Administration’s problematic pattern of delaying or ignoring requests from minority Members of Congress. For example, on March 15, 2017, Senate Democrats released a list of more than 100 oversight request letters that Trump Administration officials had not answered.<sup>13</sup> Among those unanswered requests was a letter we sent to Donald McGahn, Counsel to the President, regarding White House officials’ use of private email accounts.<sup>14</sup> The list also included outstanding requests to a range of Trump Administration officials at various federal agencies, including Attorney General Sessions, Secretary of State Tillerson, Environmental Protection Agency Administrator Pruitt, Secretary of Defense Mattis, and Secretary of Commerce Ross, among others.

While it might be reasonable to attribute some delay in responding to Congressional requests to the presidential transition process, recent reports suggest that the Trump Administration’s lack of transparency and responsiveness may be by design. For example, a January 20, 2017, memo from the Acting Secretary of Health and Human Services (HHS) to agency staff prohibit the dissemination of any “correspondence to public officials (e.g., Members of Congress, Governors) or containing interpretation or statements of Department regulations or

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In order to better understand the Department's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Department official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
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3. Since January 20, 2017, has the Department issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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5. Since January 20, 2017, has any Department official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]  
[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman

# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Eric M. Thorson  
Inspector General  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Dear Inspector General Thorson:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of the Treasury's processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

## **Preservation of Electronic Records**

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[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
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cc: The Honorable Ron Johnson  
Chairman

## United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

CHRISTOPHER R. HIXON, STAFF DIRECTOR  
MARGARET E. DAUM, MINORITY STAFF DIRECTOR

June 8, 2017

The Honorable Michael J. Missal  
Inspector General  
U.S. Department of Veterans Affairs  
Office of Inspector General  
810 Vermont Avenue, NW  
Washington, DC 20420

Dear Inspector General Missal:

We write today to request that the Office of the Inspector General (OIG) conduct a review of the Department of Veterans Affairs' processes and compliance with applicable legal standards for preserving certain electronic records as federal records, and cooperation with Congressional document requests.

### **Preservation of Electronic Records**

In 2014, Congress amended the Presidential Records Act and the Federal Records Act (FRA) regarding the preservation, storage, and management of federal records. The National Archives and Records Administration (NARA) also provided federal agencies with specific guidance on how to comply with federal law regarding the preservation of electronic messages in Bulletin 2015-02, "Guidance on Managing Electronic Records".<sup>1</sup> Pursuant to 44 U.S.C. § 2911, agencies have additional requirements to manage records created or received in nonofficial and personal electronic messaging accounts.<sup>2</sup> NARA plays an essential role in preserving our history as the nation's federal record-keeper, and the Archivist of the United States, as head of NARA, has final authority on how agencies must preserve electronic records as federal records.<sup>3</sup> NARA recently surveyed the FRA compliance of federal agencies, and noted that many agencies "reported having difficulty identifying electronic messages that are records."<sup>4</sup>

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policy, unless specifically authorized by me [the Acting Secretary]" or a designee.<sup>15</sup> Most recently, Senator Carper noted, regarding GSA's lack of responsiveness to congressional requests for information on the Trump Organization's lease with the General Services Administration (GSA) to redevelop and manage the Old Post Office building, that, effective January 20, 2017, the Trump Administration appeared to have changed GSA's "long-standing practice of providing certain documents requested by minority members of congress, including the ranking member of the committee of jurisdiction with direct oversight."<sup>16</sup> During a recent bipartisan briefing with GSA, "agency personnel stated that its new practice only assures that [requested] documents will be provided to the committee's chairman."<sup>17</sup> Additionally, *Politico* recently reported that during meetings this spring with senior officials for various federal agencies, a Deputy Counsel and Special Assistant to the President, "told agencies not to cooperate" with congressional oversight requests from Democrats.<sup>18</sup> These newly-implemented policies are deeply troubling and may also run afoul of several laws that prohibit interference with federal employees' ability to communicate with Congress, including, but not limited to the Whistleblower Protection Enhancement Act, Section 713 of the Consolidated Appropriations Act of 2016, as well as 5 U.S.C. § 7211.

In order to better understand the Department's compliance with federal laws governing records retention and compliance with Congressional requests and federal recordkeeping requirements for electronic messages, we ask that you conduct a review and provide a written response not later than July 6, 2017, which addresses the following questions:

1. Since January 20, 2017, has any Department official directed or advised any agency employee to delay or withhold a response to a Congressional request for information? If any such directive is in writing, please provide a copy.
2. Since January 20, 2017, has any Department official directed or advised any agency employee or Congressional staff member that the agency will only provide requested documents or information to a Committee chair? If any such directive is in writing, please provide a copy.
3. Since January 20, 2017, has the Department issued any guidance related to the use of smartphone applications that support encryption or the ability to automatically delete messages after they are read or sent for work related communications?

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<sup>15</sup> Memorandum from Acting Secretary, U.S. Department of Health and Human Services to HHS OPDIVHeads and StaffDiv Heads (Jan. 20, 2017).

<sup>16</sup> Senator Tom Carper, *Carper Statement on Trump Hotel Lease* (Mar. 31, 2017) (online at <https://www.carper.senate.gov/public/index.cfm/pressreleases?ID=77B68657-FD23-4902-9A64-AE1314F64EAF>).

<sup>17</sup> *Id.*

<sup>18</sup> *White House Orders Agencies to Ignore Democrats' Oversight Requests*, *Politico* (June 2, 2017) (online <http://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034>).



4. Since January 20, 2017, has any Department official used, for work-related communications, a smartphone app, including, but not limited to, WhatsApp, Signal, Confide, and others that support encryption or the ability to automatically delete messages after they are read or sent?
5. Since January 20, 2017, has any Department official failed to abide by federal law and/or NARA or Departmental guidance regarding preservation of electronic records related to official business, including, but not limited to, text messages, chats, instant messages, social media messages, or emails created on non-government accounts?
6. Has the OIG previously provided recommendations to the Department regarding its management of the preservation of electronic records and compliance with Congressional document requests? If so, please provide a list of any OIG recommendations that remain outstanding.

If you or members of your staff have any questions about this request, please feel free to ask your staff to contact [REDACTED] with Ranking Member McCaskill's office at 202-224-2627 or [REDACTED] with Senator Carper's office at 202-224-2441. [REDACTED]  
[REDACTED] Thank you very much for your attention to this matter.

Sincerely,



Claire McCaskill  
Ranking Member



Tom Carper  
United States Senator

cc: The Honorable Ron Johnson  
Chairman